Filed 6/7/17 P. v. Leonard CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHAD CHRISTOPHER LEONARD, Defendant and Appellant.	E064649 (Super.Ct.No. FWV1400948) OPINION

APPEAL from the Superior Court of San Bernardino County. Shahla Sabet, Judge. Affirmed in part; reversed in part with directions.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Supervising Deputy District Attorney, and Heidi Salerno, Deputy Attorney General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Chad Christopher Leonard brutally punched, stabbed, choked, and threatened to kill his former girlfriend, Jane Doe (Doe). Several neighbors and defendant's father intervened, saving Doe's life. During the struggle, one of the neighbors, Steven, was stabbed five times.

Defendant appeals from judgment entered following jury convictions for attempted murder of Doe (Pen. Code, §§ 664, 188[1]; count 1); infliction of corporal injury upon Doe (§ 273.5, subd. (a); count 2); assault with a deadly weapon upon Steven (§ 245, subd. (a)(1); count 3); mayhem (§ 203; count 4); criminal threats (§ 422; count 5); and assault with a deadly weapon upon Doe (§ 245, subd. (a)(1); count 6). The jury also found true the following enhancement allegations: defendant personally used a knife as to counts 1, 2, and 4[2]; personally inflicted great bodily injury (GBI) as to counts 1, 2, and 6[3]; and personally inflicted GBI, as to count 3.[4] The court further found true that

---

[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] Section 12022, subdivision (b)(1).

[3] Section 12022.7, subdivision (e).

[4] Section 12022.7, subdivision (a).

defendant suffered one prior strike.[5] The trial court sentenced defendant to 31 years 4 months in state prison.

Defendant contends his sentences on counts 2, 4, and 5 should be stayed under section 654 because the offenses were part of a single, indivisible course of action, in which defendant had the single intent and objective of killing Doe. Alternatively, defendant argues the court abused its discretion in imposing consecutive sentences on counts 4 and 5. Defendant further urges this court to reverse the orders requiring defendant to pay $750 in attorney fees and $665 for the probation report, because there is no evidence of defendant's ability to pay the fees. In addition, defendant requests this court to order the trial court to correct the sentencing minute order and abstract of judgment to state that defendant's sentence on count 6 is stayed under section 654. Also, the People maintain that defendant's sentence on count 5 is incorrect.

We affirm the judgment of conviction but order the sentence on count 5 corrected to impose 16 months in prison, *not* 32 months (two years eight months). The trial court is further directed to correct the sentencing minute order to show that defendant's sentence on count 6 is stayed (not concurrent). In addition, the sentencing order requiring defendant to pay $750 in attorney fees is reversed and remanded for a determination and express findings under section 987.8, subdivision (g)(2)(B), as to whether there are unusual circumstances that support a finding that defendant has a discernible future financial ability to pay attorney fees while serving a lengthy prison term. The sentencing

[5] Sections 1170.12, subdivisions (a)-(d) and 667, subdivisions (b)-(i).

order requiring defendant to pay $655 for probation report costs is also reversed and remanded for a determination and express findings as to whether defendant has discernible future financial ability to pay probation report costs while serving his lengthy prison term.

II

FACTS

Defendant dated Doe in high school, broke up with her, and reconnected about 15 years later, in December 2013. Defendant and Doe began dating again in January or February 2014. Defendant regularly spent the night at Doe's apartment. He became possessive and controlling of Doe. Defendant wanted to know where she was and with whom she spent her time, but did not believe what Doe told him. He was jealous and physically abusive. Defendant abused drugs, including methamphetamine and cocaine. These issues led to a turbulent, violent relationship. Defendant and Doe frequently broke up and then reunited when defendant promised he would change.

On February 4, 2014, defendant and Doe began arguing at Doe's apartment. Defendant became upset and threw Doe against the wall. He pinned her down on the ground to prevent her from leaving, and took Doe's phone so she could not call 911. When defendant's brother arrived to take defendant home, defendant released Doe, dropped her phone, and ran off. Doe did not call the police because she feared defendant would retaliate against her. Instead, Doe recorded her own description of the incident which had occurred.

A few weeks later, while Doe was driving defendant to a car show, defendant told Doe to pull over so he could sober up. When she did so, defendant took her keys and phone and fled. Eventually, Doe got her keys and phone back and she and defendant drove to defendant's parents' home where defendant lived. When they got to his street, defendant yelled at Doe, pulled her emergency brake, and stopped her car. Doe eventually was able to drive defendant to his house and parked. Defendant grabbed her phone, reached across her, laid his body over Doe, and held her door closed to prevent Doe from leaving the car. Doe eventually was able to exit her car and ran toward defendant's house. Defendant blocked her. Eventually, defendant went inside his house and Doe drove away.

After this incident, defendant and Doe permanently broke up. Nevertheless, a week later, Doe went to defendant's house to pick up a movie she needed to return. Defendant went with her to return the movie. Afterwards, when Doe drove him home, he refused to get out of Doe's car and grabbed Doe's phone. He reached across her, laid his body over her, and held her door closed to prevent Doe from exiting the car. After struggling for an hour, Doe managed to get out of the car and run to the front door of defendant's home to seek help from defendant's parents. Defendant's parents retrieved Doe's phone from defendant and returned it to Doe. Doe then left.

A week later, Doe needed help repairing her car while stranded on the freeway. Because she was unable to find a mechanic to help her, she called defendant, who worked on cars. Defendant was kind to Doe on that occasion and fixed her car, without engaging

in any inappropriate behavior. After that, Doe continued to make it clear to defendant that their relationship was over but he continued to call her frequently.

The March 15, 2014 Incident

On March 15, 2014, a week after defendant assisted Doe with her car, defendant called Doe at her home at least five times around 1:00 a.m. When Doe finally answered the phone, defendant asked her for a ride home from Kelly's bar in Chino. He sounded intoxicated and said he was too drunk to walk home. Doe eventually relented and picked him up. Defendant appeared to be intoxicated. During the five-minute ride to defendant's home, Doe and defendant did not argue, although defendant said he did not want to go home.

When defendant and Doe arrived at defendant's home, Doe told defendant to get out of the car. Defendant did not respond and slouched over. Doe told defendant she would call the police if he did not get out. Defendant said, "Go ahead and call them. Call the police." Doe said she was going to go get his parents. She got out of the car and walked toward the front door of defendant's house. As she did so, Doe heard something and turned around. Defendant punched her in the face several times and slashed her lip with his pocket knife. She fell to the ground and curled up into a ball. While Doe was on the ground, defendant stabbed her 11 or 12 times throughout her upper body and neck. He then turned Doe over and put her into a choke hold and strangled Doe until she could no longer breath. While strangling Doe, defendant told her, "You're going to die, bitch." Doe screamed and tried to fight back.

Meanwhile, defendant's parents, Rosemary and Greg, came outside. Rosemary yelled for help. Greg tried to pull defendant off Doe. Defendant continued lunging at her. Greg put defendant in a chokehold. Neighbors, including Erica, her sister Monique, and their cousin Steven, ran over to help Doe. Steven helped Greg pull defendant away from Doe. Steven and two other men pinned defendant down. Erica called the police. She reported that defendant had stabbed a woman and tried to kill her. Three men were trying to hold down defendant and get a knife away from him. The woman reportedly ran inside a house. While Steven was holding down defendant, defendant stabbed Steven five times.

When police officers Jette and Blanco arrived at the scene, they found several men on top of defendant, holding him down. Defendant had a knife in his hand. When the men released defendant, as instructed by the officers, defendant stood up and backed away from the officers while holding the knife. Defendant appeared agitated and upset. Officer Jette told defendant to drop the knife. Defendant said, "No." Officer Jette said he would shoot defendant if he did not drop the knife. Defendant responded, "I don't give a fuck. [¶] . . . [¶] . . . Fucking shoot me." Defendant took off his sweatshirt and held the knife to his throat. Monique told the officers that she had heard a woman scream and saw the woman lying on the ground, practically dead, with her neck cut and blood everywhere. The woman had gone inside the house.

Detective Johnson and Sergeant Marrata engaged in crisis negotiations with defendant in front of the house for two and a half hours. Defendant moved around the

front yard, at times holding the knife to his neck. Defendant finally put down the knife, complied with the officers' orders, and was arrested.

Meanwhile, after Doe went inside defendant's parents' house, she told defendant's parents not to let defendant inside because he was trying to kill her. Doe was bleeding profusely and having difficulty breathing. She called 911 and told the operator defendant had tried to kill her. The paramedics transported Doe to the hospital. She suffered severe injuries, including numerous stab wounds to her back, neck, both lungs, head, upper lip, and arms. Steven was also treated at the hospital for stab wounds in the upper abdomen, back, and head.

Defendant's Testimony

Defendant testified that during the evening of March 15, 2014, he drank beer at a friend's home and then went to two bars, where he drank beer and an unknown amount of liquor. Defendant did not remember much about Doe picking him up at Kelly's bar. Although the bar was only two miles from his house, he was too unstable to walk home. He remembered throwing up while Doe drove him home. When Doe tried to get him out of her car in his driveway, she pushed him and slammed the car door on his body and face. He did not remember much after that. He did not remember stabbing Doe with a knife or telling her he was going to kill her. He also did not remember his father grabbing him. He remembered someone was on top of him, and only remembered portions of the two and a half hours of crisis negotiations. Defendant admitted convictions for crimes for receiving stolen property, assault with a deadly weapon, and making criminal threats against C.A.

Prior Uncharged Offenses

Two of defendant's former girlfriends testified defendant had been physically abusive with them during their relationships with defendant. Ten years before the charged crimes, defendant dated K.A. During that time, defendant had physically assaulted K.A. 24 times, including punching, slapping, and choking her. After defendant's relationship with K.A. ended, defendant had a relationship with C.A., during which he and C.A. had a son. During C.A. and defendant's relationship, defendant on one occasion put a knife to C.A.'s throat and threatened to kill her. A week later, while defendant and C.A. were in defendant's bedroom, defendant paced the room while holding a loaded gun. He accused her of cheating, which C.A. denied. While sitting on top of C.A., he put his head next to hers, pointed the gun at their heads, and said, "I'm going to kill you." C.A. called the police and defendant was arrested.

III

STAYING SENTENCING ON COUNTS 2, 4, AND 5

UNDER SECTION 654

The trial court sentenced defendant to 18 years for attempted murder (count 1); eight years concurrent for infliction of corporal injury (count 2); two years eight months consecutive for mayhem (count 4); and two years eight months consecutive for criminal

threats (count 5). Defendant committed each of these offenses against Doe on March 15, 2014.[6]

Defendant contends his sentences on counts 2, 4, and 5 should be stayed under section 654, because the offenses were part of a single, indivisible transaction, in which defendant harbored a single intent and objective to kill Doe (count 1). Defendant argues he held this single intent from the time he exited the car and attacked her, until his father and a neighbor subdued him.

Section 654 prohibits multiple punishment for a single act or omission or for an indivisible course of conduct that violates more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208-1212; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) However, even where the violations share common acts or are part of an otherwise indivisible course of conduct, the defendant may be punished for multiple violations if the defendant entertained multiple criminal objectives that were independent of and not merely incidental to each other. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*); *Beamon*, at pp. 638-639; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253.)

On appeal, the trial court's express and implied findings are entitled to deference. Whether a course of criminal conduct violating more than one penal statute constitutes a divisible course of action and whether the violations were committed with separate criminal intents or objectives are ordinarily questions of fact for the trial court, whose

[6] Sentencing on counts 3 and 6, and on the enhancements is not mentioned here, as it is not relevant to defendant's section 654 sentencing objection.

express or implied findings will be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730 (*Osband*).) The trial court's determination must be reviewed in the light most favorable to the respondent, presuming the existence of every fact the trial court could reasonably deduce from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

We first must ascertain in a section 654 application the defendant's objective and intent. Here, there is substantial evidence supporting a reasonable finding that defendant initially intended to beat up Doe in violation of section 273.5, subdivision (a) (count 2), when he first assaulted Doe as she walked away from her car. Doe had just tried to get defendant out of her car and he resisted. As Doe walked toward the front door to get assistance, there was no indication defendant intended to kill Doe.

Defendant's initial conduct could be viewed simply as an act of domestic violence in violation of section 273.5, subdivision (a). A conviction for this crime required willful infliction of "corporal injury resulting in a traumatic condition upon a victim." The trial court reasonably found defendant initially only intended to commit domestic violence by beating up Doe, as he had done before when angry at her. The evidence further supports a finding that, after punching Doe in the face, defendant devised a new objective of disfiguring Doe's face by slitting her lip with his knife. By doing so, defendant committed the separate act of maiming Doe (count 4).

After Doe fell to the ground and curled up into a ball, defendant could have walked away. The evidence supports a reasonable finding that, instead, at that point, defendant formed the new objective of attempting to kill Doe as she lay on the ground

(count 1). If he had intended to kill her before, he could have done so when he first assaulted her, when she was still standing. Finally, when it became apparent third parties would rescue Doe, defendant stopped stabbing Doe and formed the new, separate objective of threatening to kill Doe in violation of section 422 (count 5). He turned Doe over, put her into a choke hold and told her, "You're going to die, bitch."

Substantial evidence supports the trial court findings that defendant committed counts 1, 2, 4, and 5 in furtherance of separate objectives, rather than in furtherance of the single objective of killing Doe. Even though the charged crimes were committed in close temporal proximity, they were properly punished as separate crimes. This is because "[i]t is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*Harrison, supra,* 48 Cal.3d at p. 335.) A defendant should not be rewarded by being punished for a single crime when he has committed multiple criminal acts, during which he had the opportunity to cease his criminal conduct between crimes and walk away. (*Id.* at p. 338.) Defendant's multiple crimes committed during the entire lengthy violent episode supported separate punishment of defendant for counts 2, 4, and 5, as well as count 1 for attempted murder.

Defendant argues this case is analogous to *People v. Bui* (2011) 192 Cal.App.4th 1002 (*Bui*), in which the defendant fired three shots at the victim, within seconds of each other. The *Bui* court held the defendant could not be punished for both attempted murder and mayhem because both offenses were based on a single violent attack and single objective of killing the victim. Defendant argues that the evidence in the instant case

demonstrates defendant had a single intent and objective to kill Doe by means of a single course of conduct.

Defendant's reliance on *Bui, supra,* 192 Cal.App.4th 1002 is misplaced. The evidence shows that, although the brutal acts against Doe were committed in close temporal proximity, each offense occurred after defendant formed new, separate objectives and intents to harm and terrorize Doe by different means. The crimes were based on a succession of evolving conduct and newly formed objectives.

With each newly devised objective, defendant inflicted upon Doe a different offense. Defendant committed the initial blows to Doe's head with his fist. Then in a separate act, he used his pocket knife to slice Doe's lip, disfiguring her face. After knocking Doe to the ground, defendant could have walked away but instead formed the new intent to kill Doe by stabbing her to death. He then stopped stabbing her, flipped her body over, and began choking her while telling her she was going to die, as third parties came to her rescue. Evidence of these facts was sufficient to support the trial court imposing multiple punishment for counts 2, 4, and 5 as separate crimes, in addition to count 1, based on defendant forming separate objectives and intents for each offense.

IV

GBI ENHANCEMENT ATTACHING TO COUNT 2

Defendant argues that, in the event this court holds sentencing on count 2 need not be stayed under section 654, the GBI enhancement (§ 12022.7, subd. (e)) attaching to count 2 must be stayed rather than imposed concurrently. Defendant reasons that the enhancement should be stayed because there was only a single attack on Doe, the

attempted murder, and the GBI enhancement was imposed on count 1 (attempted murder). Therefore the GBI enhancement cannot also be imposed on count 2 (corporal injury upon a former girlfriend). We disagree.

Defendant cites *People v. Reeves* (2001) 91 Cal.App.4th 14, *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817, 819, and *People v. Culton* (1979) 92 Cal.App.3d 113, 117 for the proposition that it is improper to impose more than one GBI enhancement based on an indivisible assault upon Doe. *Reeves, supra*, , *Moringlane, supra*, and *Culton, supra,* are inapposite because, in the instant case, there is evidence establishing that the crimes upon which the GBI enhancements attach (attempted murder and corporal injury) are divisible crimes committed in furtherance of separate objectives. (*People v. Wooten* (2013) 214 Cal.App.4th 121, 124.) The corporal injury offense (count 2) occurred when defendant initially punched Doe in the face and head, causing her to fall to the ground. The attempted murder offense (count 1) occurred thereafter, when Doe lay on the ground and defendant stabbed her with a knife 11 or 12 times in the upper body. The trial court therefore properly imposed GBI enhancements on both counts 1 and 2, and was not required to stay the GBI enhancement on count 2 under section 654.

V

CONCURRENT SENTENCING ON COUNTS 4 AND 5

Defendant alternatively contends the trial court erred in imposing sentencing on counts 4 and 5 consecutively, instead of concurrently, as requested by defendant. We disagree.

Under section 669, the sentencing court has an affirmative duty to determine whether sentencing for multiple offenses is to be imposed concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) Section 669 leaves this determination to the trial court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) The trial court is not required to presume in favor of concurrent sentencing. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) The sentencing court is required to state reasons for its sentencing choices. (Cal. Rules of Court, rule 4.406(b)(5).[7]) "[O]nly a single aggravating circumstance is required to impose consecutive sentences." (*People v. Leon* (2010) 181 Cal.App.4th 452, 469, citing *Osband*, *supra*, 13 Cal.4th at pp. 728-729.) Even with the broad discretion afforded the sentencing court, the court's sentencing decision will be subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Here, the trial court imposed consecutive sentencing on counts 4 and 5 based on rule 4.425(a)(2) which provides guidelines for determining whether to impose consecutive or concurrent sentencing. In exercising its discretion, the court stated: "Criteria affecting concurrent or consecutive sentence, Rule 4.425, fact relating to the crime, the crimes did involve separate acts of violence or threat of violence." Defendant argues that relying on this factor constitutes dual use of the same facts to impose consecutive sentences in violation of rule 4.425(b)(1). Defendant maintains that the court improperly relied on the violent nature of defendant's conduct both to impose upper term

[7] Undesignated rule references are to the California Rules of Court.

sentences on counts 1, 2, and 6, and consecutive sentences on counts 4 and 5. In addition, defendant argues counts 1, 2, 4, 5, and 6 all involved a single victim and an uninterrupted attack, in which there were not separate acts of violence. Defendant also asserts that the trial court failed to consider existing factors in mitigation.

During sentencing, the trial court stated it relied on the following aggravating factors stated in rule 4.421 when imposing upper terms on counts 1, 2, and 6: "[*T*]*he crime involved great violence*, great bodily harm and threat of great bodily harm, and the act disclosed a high degree of cruelty, viciousness, and callousness. [¶] Further, the Court finds the manner in which the crime was carried out indicates planning, sophistication, or professionalism. This is despite the fact that he indicates that he has no memory, and it was spontaneous. But his prior history with other victims indicate otherwise. [¶] Facts relating to the defendant include the defendant has *engaged in violent conduct* that indicates a serious danger to society. The defendant's prior conviction as an adult are numerous and are of increasing seriousness. The defendant has served prior prison terms. The defendant was on a grant of probation when the crime was committed. And the defendant's prior performance on probation was unsatisfactory." (Italics added.) The court further stated it found there were no mitigating circumstances under rule 4.423.

The trial court did not rely on any of these aggravating factors when imposing consecutive sentence on counts 4 and 5. The court stated it imposed consecutive sentencing based on there being *separate acts* of violence or threats of violence, and not based on the violent nature of defendant's acts. Evidence supporting the finding

defendant committed separate acts of violence, included evidence defendant punched Doe in the face and head, disfigured her face by slicing her lip, stabbed Doe 11 or 12 times while she lay on the ground, attempted to choke and strangle Doe, threatened to kill her, and stabbed Steven five times. Furthermore, although a single factor was sufficient to impose consecutive sentencing, the trial court could have also based consecutive sentencing on counts 4 and 5 on the following additional factor, discussed in the preceding section of this opinion: "The crimes and their objectives were predominantly independent of each other." (Rule 4.425(a)(1).)

Defendant also argues the trial court failed to take into consideration his mitigating factors. Defendant asserts the court overlooked the mitigating factors that he was intoxicated and was mentally unstable at the time of the offenses, and thus significantly reduced culpability for the crimes. (Rule 4.423(b)(2).) Defendant suffered from drug and alcohol addiction, and mental diseases. He had a history of psychiatric disturbances and suicide attempts, but refused to take medication for his psychiatric ailments. Instead, he self-medicated with alcohol, methamphetamine, marijuana and cocaine, starting at a young age. There was evidence that, at the time of the charged offenses, defendant was under the influence of alcohol. Witnesses testified defendant was only violent when he was under the influence of drugs or alcohol. Defendant therefore should have known abusing alcohol and drugs tended to make him more violent, based on his history of violence when abusing such substances. Under these circumstances, it was not unreasonable or an abuse of discretion for the trial court not to consider defendant's mental or physical condition as a mitigating factor.

The trial court therefore did not abuse its discretion in imposing consecutive sentences on counts 4 and 5 based on the aggravating factor of defendant committing separate acts of violence (rule 4.425(a)(2)).

VI

ATTORNEY FEES AND COSTS

Defendant requests this court to reverse the trial court order that defendant pay $750 in attorney fees and $665 for the cost of conducting the presentence investigation and preparation of the probation report (§ 1203.1b). Defendant argues there was no evidence he had the ability to pay these fees and costs. The probation report stated defendant had no assets or savings, had $1,400 in debts, and was unemployed but earning $500 a week "under the table." He also received $180 in food stamps and lived with his parents. The probation report concluded defendant had the ability to pay $750 in attorney fees and $665 for the cost of preparation of the probation report.

Defendant argues he did not have the ability to pay the fees and costs because he was sentenced to over 31 years in prison, he did not have any assets, and he did not have any ability to earn money. In addition, the court ordered him to pay $79,928.70 in restitution to Doe, $2,000 in restitution under section 1202.4, and $420 for the court security and criminal conviction fees.

At the sentencing hearing, defense counsel requested the court to strike the attorney fees and probation fees recommended by the probation department. No specific objection or grounds were stated. Without elaborating further or requesting a hearing on

defendant's ability to pay the fees, defense counsel requested the court to reduce the recommended restitution fines from $10,000 to the minimum fine of $300.

Without making any express findings, the court ordered defendant to pay $750 in attorney fees and $665 in probation report costs but reduced the recommended $10,000 restitution fines under sections 1202.4 and 1202.45, to $2,000 "so the money will go to the victim instead of the fund." The court further ordered the restitution fine under section 1202.45 suspended and then permanently stayed pending successful completion of parole. After the court stated defendant's sentence, the court asked if there was anything else counsel wished to state. Both attorneys said no.

A. Imposition of Attorney Fees

Proceedings to order a defendant to reimburse the county for attorney fees "'involve the taking of property, and therefore require due process of law, including notice and a hearing.' [Citations.] In California, the statutory procedure for determining a criminal defendant's ability to reimburse the county for the services of court-appointed counsel is set forth in section 987.8. Under the statute, a court may order a defendant, who has the ability to pay, to reimburse the county for the costs of legal representation." (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72-73 (*Phillips*); see *People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1420; § 987.8.)

A separate hearing on the defendant's ability to reimburse the county for attorney fees and the costs of the probation investigation and report, apart from the sentencing hearing, is not required. (*Phillips, supra,* 25 Cal.App.4th at pp. 68-70, 76.) A defendant may be afforded adequate notice of the time and place of the hearing on defendant's

ability to pay attorney fees and costs "by the probation officer's report, which included in its recommendations 'Attorney Fees if appropriate,' as one of several fines or fees which should be considered at the sentencing hearing." (*Id.* at p. 74.)

Here, the trial court did not provide notice or conduct a hearing on defendant's ability to pay attorney fees, apart from notice in the probation report and the sentencing hearing. Nor did defendant request a separate hearing or object to notice. The court also did not state on the record specific findings regarding defendant's ability to pay. Nevertheless, we conclude defendant received sufficient notice of the hearing on the attorney fees matter by means of the probation report recommendation the court order defendant to pay $750 in attorney fees. The attorney fees were ordered in accordance with this recommendation during the sentencing hearing. "[W]e are satisfied that the probation officer's reference to attorney fees constituted notice *reasonably calculated, under all of the circumstances,* to apprise defendant that the matter would be taken up in the context of the sentencing hearing." (*Phillips, supra,* 25 Cal.App.4th at p. 74.) An additional evidentiary hearing and notice were not required under such circumstances, particularly where defendant made no request for a separate hearing. (*Id.* at pp. 68-70, 76.)

Defendant argues the trial court made no attempt to ascertain whether defendant had the present ability to pay the court ordered fees. But the court stated it considered the probation report, which stated a finding that defendant had the present ability to pay $750 in attorney fees. The probation report also contained information relevant to defendant's ability to pay the fees, including that, at the time of his arrest, defendant was earning

$500 a week "under the table." He also received $180 in food stamps and had been living with his parents.

In addition, the court could consider defendant's future earning power in prison. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785 (*Staley*.) In *Staley*, the defendant was convicted of three drug offenses and ordered to pay a $100 drug program fee for each offense under Health and Safety Code section 11372.7, subdivision (a). The defendant appealed, arguing the trial court improperly imposed the drug program fees without determining his ability to pay them. Health and Safety Code section 11372.7, subdivision (b) required the court to determine whether the defendant has the ability to pay the drug program fee. The *Staley* court stated that "[t]his statute does not require the trial court to make an express finding of ability to pay a drug program fee, and no such explicit finding was made in this case." (*Staley*, at p. 785.) Likewise, here, section 987.8 does not require the trial court to make an express finding of ability to pay. Such a finding may be implied. (*Phillips, supra,* 25 Cal.App.4th at p. 71; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 (*Lopez*).)

The *Staley* court also noted that there need not be an ability to make immediate payment. The court found that the court-imposed fees were not exorbitant or burdensome, and therefore concluded the defendant was capable of eventually paying the fees. (*Staley, supra,* 10 Cal.App.4th at p. 786.) Likewise, here, the $750 in attorney fees and $665 in probation report fees were not exorbitant and could be earned while defendant was serving his 31-year term in prison. (*People v. Gentry* (1994) 28 Cal.App.4th 1374, 1375-1377 (*Gentry*); §§ 2700, 2801; Cal. Code Regs., tit. 15, § 3040;

Operations Manual, Calif. Department of Corrections and Rehabilitation, Chapter 5, Article 12, § 51120.1.) "[I]n making an ability to pay determination the court may consider a defendant's future prison wages in their entirety as well as the possibility of employment upon defendant's release from prison." (*Gentry,* at pp. 1376-1377.) A defendant should not be permitted to avoid the imposition of these fees while being allowed to retain his prison wages and also earn work-release credits. (*Id.* at p. 1375.)

Because of defendant's lengthy sentence of over 31 years, his prospects of employment upon his release are questionable (he was 29 years old at the time of sentencing.) But defendant may have the ability to work in prison to pay the fees. Defendant argues that it is unlikely he would be able to obtain a paying job in prison but defendant did not argue this during the sentencing hearing. His attorney merely requested the fees stricken without stating any grounds or facts refuting the court and probation department's findings defendant had the ability to pay the fees. Furthermore, the trial court made no express findings on defendant's ability to pay.

While section 987.8 ordinarily does not require an express finding of ability to pay, subdivision (g)(2)(B) "contains a presumption that those sentenced to prison are unable to pay. 'Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.' (§ 987.8, subd. (g)(2)(B).)" (*Lopez, supra,* 129 Cal.App.4th at p. 1537.) The court in *Lopez* construed subdivision (g)(2)(B) as requiring "an express finding of unusual circumstances before ordering a state prisoner to reimburse his or her attorney." (*Ibid.*) In the instant case, there was no such express

finding of unusual circumstances when the trial court ordered defendant to pay $750 in attorney fees. Therefore this matter is remanded to the trial court to make express findings on whether there were unusual circumstances supporting a finding defendant had future financial ability to pay attorney fees during his lengthy prison term.

B. Payment of $665 Fee for Cost of Probation Report

Defendant similarly argues there was no evidence to support the trial court's implicit finding defendant had the ability to pay the $665 fee for the cost of preparing the probation report. This fee is governed by section 1203.1b, subdivision (b), which provides that, when "the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative."

Section 1203.1b makes further provision for the conduct of the hearing and defines "'ability to pay'" as the "overall capacity of the defendant to reimburse the costs" (§ 1203.1b, subd. (e)). Factors to be considered include, but are not limited to the defendant's: "(1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain

employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (§ 1203.1b, subd. (e)(1) - (4).) Unlike the attorney fees provision, section 987.8, subdivision (g)(2(B), there is no presumption under section 1203.1b that a defendant sentenced to prison does not have a future ability to pay for probation fees.

Defendant objects to the order imposing the $665 probation report fees based on essentially the same grounds asserted in challenging payment of attorney fees. He argues the trial court did not state any findings he had the ability to pay the $665 fee and there is no evidence in the record supporting an implied finding of ability to pay the fee. Defendant asserts that the probation report stated he had been unemployed for three or four years, worked only two or three weeks before his arrest, had no assets, and had $1,400 in debts. Defendant also argues he was sentenced to over 31 years in prison and it is unlikely he will be placed in a paying job in prison within one year of sentencing (§ 1203.1b, subd. (e)(3)).

We conclude, for the same reasons stated above regarding imposition of the attorney fees order, that this matter must be remanded to the trial court for findings on whether defendant had a future financial ability to pay the $665 probation fee while serving a lengthy prison term. The only evidence the People argue support a finding defendant might have an ability to pay the $665 fee consists of facts in the probation report that at the time of his arrest (1) defendant was earning $500 a week "under the table", which presumably he would not be earning in prison, (2) he received $180 in food stamps, which he would not receive in prison, and (3) he lived with his parents. These

factors do not support a finding of future ability to pay, other than upon his release in about 30 years.

As to defendant's future ability to pay by working in prison, there is no presumption under section 1301b that a defendant sentenced to prison does not have an ability to pay. Nevertheless, the order for payment of the $655 fee is reversed and remanded for findings on ability to pay, since there is no evidence defendant actually could earn $655 in prison and this matter must be remanded anyway for findings on defendant's ability to pay the $750 attorney fee.

VII

ERRORS IN SENTENCING MINUTE ORDER AND ABSTRACT OF JUDGMENT AS TO COUNTS 5 AND 6

The court stated the correct aggregate sentence of 31 years 4 months, but misstated defendant's term on count 5 as two years eight months. The term should be 16 months. Also, the sentencing minute order and abstract of judgment misstate the sentence imposed on count 6.

A. Count 6

The parties agree the sentencing minute order dated September 21, 2015, and the abstract of judgment both incorrectly state that defendant's count 6 sentence was imposed

concurrent to count 1. The minute order and abstract of judgment should state, as ordered by the trial court, that defendant's sentence on count 6 was stayed.[8]

B. Count 5

The People argue in their appellate respondent's brief that the sentencing minute order dated September 21, 2015, and abstract of judgment incorrectly state as to count 5, that defendant was sentenced to one year four months. The minute order states that, as to count 5, the court imposed "the 1/3 midterm, for a total of 1 year[] 4 months. [¶] Count 5 to run consecutive to Count 4." The abstract of judgment and probation report also state a term of one year four months (16 months) as well. Citing the reporter's transcript, the People assert on appeal that defendant's sentence should be two years four months, and defendant's aggregate sentence should therefore be increased to 32 years four months. We disagree.

During the sentencing hearing, the trial court did not state it was sentencing defendant on count 5 to two years four months. The court erroneously stated during sentencing: "Count 5 to be consecutive to Count 1, again, criminal threat, a violation of Penal Code section 422(a) of the Penal Code, the Court imposes one-third of the middle term for *two years and eight months*. That's after the 16 months is doubled under Penal Code section 1170.12(C)(1). There is no enhancement as to that count. So total sentence for Count 5 is *two years, eight months*." (Italics added.)

---

[8] The minute order and abstract of judgment correctly state that the related enhancement on count 6 was stayed.

The trial court seems to have misstated the probation report's recommended sentence for count 5. The probation report recommended the following sentence: "Count 5: To be consecutive to the above; Criminal Threats . . . , in violation of Section 422(a) of the Penal Code, for one-third (1/3) the mid term of two (2) years for eight (8) months, doubled pursuant to PC 1170.12(c)(1) for 16 months." This appears to be a correct statement of the middle term for a criminal threats conviction, which the trial court indicated it intended to impose as to count 5. The sentence on count 5 is therefore ordered corrected to be 16 months, which is consistent with the determinate sentencing law, section 1170, subdivision (h)(1), as well as the September 21, 2015 sentencing minute order, the abstract of judgment, and the probation report recommended sentence for count 5.

VIII

DISPOSITION

The judgment of conviction is affirmed but the sentence is ordered modified in part and reversed in part as follows. The trial court is directed (1) to modify the sentence on count 5 to be 16 months (*not* two years eight months) and (2) to amend the sentencing minute order dated September 21, 2015, to state that defendant's sentence on count 6 is stayed as is the related enhancement on count 6. The Department of Corrections and Rehabilitation is similarly directed to correct the abstract of judgment to show that defendant's sentence on count 6 is stayed as is the related enhancement on count 6.

In addition, the sentencing order requiring defendant to pay $750 in attorney fees is reversed and remanded for a determination and express findings under section 987.8,

subdivision (g)(2)(B), as to whether there are unusual circumstances that support a finding that defendant has future financial ability to pay attorney fees while serving a lengthy prison term.

The sentencing order requiring defendant to pay $655 for probation report costs is also reversed and remanded for a determination and express findings as to whether defendant has a discernible future financial ability to pay probation report costs while serving a lengthy prison term. Sentencing in all other respects is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.